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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1178

OZARK CHEMICAL COMPANY, A CORPORATION, PETITIONER

v.

H. C. JONES, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The District Court for the Western District of Oklahoma rendered no opinion. The opinions of the Circuit Court of Appeals for the Tenth Circuit (R. 220–232) are reported in 125 F. (2d) 1.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 24, 1941 (R. 232). A petition for rehearing was denied February 12, 1942 (R. 238). The petition for a writ of certiorari was filed April 25, 1942. The jurisdiction of this

Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The ultimate question is whether the petitioner is entitled, under Sections 23 (m) and 114 (b) (2) of the Revenue Act of 1934, to a deduction on account of depletion of a deposit of sodium sulphate in solution on a discovery value basis. This question in turn depends on whether the petitioner's brine wells containing sodium sulphate in solution are a mine within the meaning of Section 114 (b) (2).[1]

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set out in the Appendix, *infra,* pp. 8–12.

STATEMENT

The pertinent facts as found by the District Court may be summarized as follows:

In its income tax return for the calendar year ended December 31, 1935, the petitioner claimed a discovery depletion deduction as of June 30, 1933, on account of sodium sulphate recovered by it from its wells, and paid the tax on the balance

[1] If this question were answered in the negative, there would be presented the further question whether the finding of the District Court that the deposit had no fair market value on the date of discovery was supported by substantial evidence.

of its net income.[2] The Commissioner denied the deduction and determined a deficiency against the petitioner in the sum of $626.07. The petitioner paid the deficiency, and after filing its claim for refund, instituted this action in the District Court. (R. 23.)

Prior to April 30, 1931, petitioner engaged in drilling tests within and around a sodium lake bed in Texas during 1930 and 1931 (R. 20–22). Its tests disclosed the presence of brines containing sodium sulphate in solution (R. 21). Experiments were begun to develop a method of separating sodium sulphate from the brines in solution (R. 22).

The District Court found that since it was necessary to process the brine, value was not inherent in the brine alone, and that the value of the brine as a potential source of sodium sulphate as of April 1, 1931, was impossible of determination (R. 22). It further found that the pumping of brine from wells did not constitute a mining operation, and that brine was not a mineral (R. 22–23). Judgment was, accordingly, entered for the respondent (R. 25–26). The court below, Judge Phillips dissenting, affirmed on the ground that the brine well did not constitute a mine and the brine solution was not a mineral (R. 220–232).

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[2] The total alleged discovery depletion deduction was $8,775.67. Since petitioner's net income for the year from the operations in controversy was $7,755.08, petitioner was limited to a deduction of 50% of the income, or $3,877.54 (R. 23).

ARGUMENT

Section 23 (m) of the Revenue Act of 1934 (Appendix, *infra,* pp. 8–9) permits a reasonable allowance for depletion in computing net income in the case of (1) "mines"; (2) "oil and gas wells"; (3) "other natural deposits"; and (4) "timber." While Section 114 (b) (1) (Appendix, *infra,* p. 9) prescribes cost as the general basis for depletion allowance, Section 114 (b) (2) (Appendix, *infra,* pp. 9–10) provides that the basis for depletion in the case of mines (other than metal, coal, or sulphur mines) discovered by the taxpayer after February 28, 1918, shall be the fair market value of the property at the date of discovery or thirty days thereafter, if such mines were not acquired as the result of purchase of a proven tract or lease, and if the fair market value of the property is materially disproportionate to the cost.[3]

1. Since the discovery value depletion granted by Section 114 (b) (2) is limited only to "mines" and not to the remaining three categories permitted depletion allowances by Section 23 (m), the dispositive issue is whether petitioner's brine wells are "mines" within the meaning of those sections. We submit that the concurrent holdings of the courts below that the brine wells here in-

[3] The District Court found (R. 22) that petitioner's drilling prior to April 1, 1931, disclosed brine in solution of a potential value disproportionate to the actual investment of the parties.

volved are not "mines," are correct and do not warrant further review.

The brine wells here involved do not fall within the ordinary concept of a "mine." As the court below observed (R. 221), the normal meaning of the word is an excavation in the earth from which ores, as well as other substances such as coal, are removed by digging.[4] Pumping brine into receptacles and removing the mineral substances from the brine by condensation or evaporation is far removed from what is commonly denoted as "mining." Moreover, the courts below found that the brine said by petitioner to have been "mined" was not "a mineral"; the concurrent findings on this issue are fully supported by testimony of expert witnesses (see R. 125–126, 128, 134, 138).

That Congress intended to limit the meaning of the word "mines" in this manner appears from Sections 23 (m) and 114 (b) (2). Section 23 (m) separately lists "mines," "oil and gas wells," and "other natural deposits" but Section 114 (b) (2) applies only to "mines." It would seem clear, therefore, that "mines" do not include "oil and gas wells," to which the brine wells are more nearly analogous, or "other natural deposits", in which category brine containing the sodium sulphate solution apparently falls. Congress, therefore,

[4] See White on *Mines and Mining* (1903), Secs. 1 and 2; Lindley on *Mines* (3d ed.), Vol. 1, Secs. 88 and 89; Shamel on *Mining, Mineral and Geological Law* (1907), 17–18.

seems to have intended to identify "mines" in the normal and restricted sense as excavations, whether by tunnels, shafts, or open cuts which men enter to dig out the mineral deposits. This is the normal meaning of the words. Cf. *Atlas Milling Co.* v. *Jones,* 115 F. (2d) 61, 63 (C. C. A. 10, 1940), and cases there cited.[5]

2. But even if the brine wells were held to be mines and the brine a mineral, petitioner must fail since there was substantial evidence to support the findings of the District Court (R. 21–22, 24) that the value of the potential source of sodium sulphate as of the basic date could not be determined, and that development of a profitable method of recovery was essential before the economic usefulness of the brine could be demonstrated. The record fails to establish that the brines *per se* have any economic or intrinsic value (R. 59, 66, 67, 102). Since the brines had no demonstrable intrinsic value on discovery, and became valuable only as a result of the perfection on or after June 30, 1933 (cf. R. 22, 24) of a process for the commercial extraction of the sodium sulphate from the brine, petitioner has not brought itself

[5] Petitioner's suggestion (Br. 7) that the decision below is in conflict with the decision of this Court in *Burke* v. *Southern Pacific R. R. Co.*, 234 U. S. 669, is mistaken. That case did not involve Sections 23 (m) and 114 (b) (2) of the Revenue Act but dealt with the issue whether oil-bearing lands were mineral lands within the meaning of the Southern Pacific Land Grant Act which excepted such lands.

within the provisions of Section 114 (b) (2) and Art. 23 (m)–14 of Treasury Regulations 86 (Appendix, *infra,* pp. 11–12), even if the brine wells were mines and the brine a mineral.

CONCLUSION

The decision of the court below is correct, and there is neither any conflict nor any question which now warrants further review. It is respectfully submitted that the petition for certiorari should be denied.

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK,
Assistant Attorney General.
SEWALL KEY,
CARLTON FOX,
Special Assistants to the Attorney General.
RICHARD S. SALANT,
Attorney.

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